



## **EMPLOYMENT TRIBUNALS**

**BETWEEN**

**Claimant**

**Respondent**

**Mr G Semakula**

**and**

**Smart Parking Limited**

**HELD AT: LONDON SOUTH**

**ON: 6 March 2018**

**Before: Employment Judge Siddall (Sitting Alone)**

**Representation:**

**For Claimant: Mr J Brissett, Solicitor**

**For Respondent: Mr G Molyneaux, Counsel**

## **REASONS**

1. This was a claim for unfair dismissal brought by the Claimant Mr Semakula. I heard evidence from the Claimant and from Mr Martin Bacon, Mr Chris Fowler and Mr Fraser Richards on behalf of the Respondent.
2. The Claimant had originally brought a claim for race discrimination and at the start of the day, a full panel of three Tribunal Members had been convened. It was then realised that the claim for race discrimination had been withdrawn. The case therefore continued with myself as judge sitting alone.
3. In a claim for unfair dismissal it is first for the Respondent to establish a potentially fair reason for the termination of the Claimant's employment. The Respondent

says that it dismissed the Claimant because of his misconduct. In accordance with the test set out in the case of ***Burchell v British Homes Stores*** it is necessary for the Respondent to establish that they had a genuine belief in the Claimant's misconduct, and that this belief was based on reasonable grounds following a reasonable investigation. It is also necessary to show that dismissal was within the range of reasonable responses to the misconduct that was available to them.

4. The facts I have found and the conclusions I have drawn from them are as follows.
5. The Respondent is a parking company which operates pay and display parking schemes for site owners. It has 146 employees and a Human Resources Department of 3 people.
6. The Claimant commenced employment with the Respondent as a Patrol Officer on 29 May 2007 and he was assigned to the Wilkinson Woolwich Car Park.
7. An email dated 10 March 2017 records that a customer had reported to the Respondent that a man on this car park site was asking customers to give him cash for parking rather than purchasing tickets from the pay and display machine.
8. On 15 March 2017, Mr Fowler asked Martin Bacon to carry out an investigation. Mr Bacon is based in a different area and did not know the Claimant at all.
9. On 16 March 2017, Mr Bacon visited the car park and asked the attendant on site where he could park for the whole day, as a maximum of 3 hours parking is allowed on that site. The person that he now knows to be the Claimant, and who

is the only employee who worked on that site, said something along the lines that “if I helped him out he would help me out”. Mr Bacon asked him ‘how much?’. The Claimant replied, “I don’t know, how much do you suggest”. Mr Bacon asked ‘whether a fiver was ok’ and the Claimant said yes. He then got a ticket roll out of the machine and told Mr Bacon to put a ticket on the dashboard.

10. There is a document at page 53 of the Bundle called a “refund voucher” which is timed at 9.39 am on 16 March 2017 and which Mr Bacon says is the ticket that the Claimant gave him.
11. Following receipt of Mr Bacon’s report, Mr Fowler had a discussion about the situation with Mr Fraser Richards, Associate Director and a decision was taken to suspend the Claimant. Another member of staff, Michael Lewis, was instructed to visit the site the following day to inform the Claimant that he was being suspended.
12. There was a dispute about what happened on the 20<sup>th</sup> March 2017. I accept that Mr Fowler telephoned the Claimant on that day to provide him with details of the allegations against him. He invited the Claimant to attend an investigatory meeting the next day on the 21<sup>st</sup> March 2017. The Claimant indicated he could not attend and a second date was proposed of 22<sup>nd</sup> March 2017 but the Claimant refused to attend on this day also. I find that the Claimant told Mr Fowler that he would not attend without receiving details of the allegations against him in writing.
13. Mr Fowler reported back to Fraser Richards who made a decision to summarily dismiss the Claimant after consulting with the company’s chief operating officer.

The letter of dismissal was prepared by Human Resources and approved by Mr Richards but signed and posted in his absence. I accept that the Human Resources Department franked the envelope and delivered the letter to the nearest post box for franked mail which was found close to the office. I also find on the balance of probabilities that the letter was received by the Claimant.

14. On 24 March 2017, the Claimant wrote to the Respondent purporting to resign with immediate effect. The Respondent did not reply to that letter.
15. On 31 March 2017, the Claimant made a data subject access request.
16. On 13 April 2017, the Respondent issued Form P45 and sent it to the Claimant.
17. On 15 May the Claimant received a copy his file pursuant to his data subject access request. On 19 May he wrote to the Respondent stating that he had just seen the dismissal letter for the first time.
18. On 7 June 2017, the Claimant initiated the ACAS Early Conciliation process. The Early Conciliation Certificate was issued on 30 June and on 11 July the Claimant issued a claim for unfair dismissal and race discrimination.
19. On 16 November 2017, there was a Preliminary Hearing at the Tribunal at which the Claimant indicated that he was withdrawing his claim for race discrimination.
20. I now set out my decision.
21. Although it is alleged by the Claimant that he did not receive the dismissal letter dated 20 March 2017 Mr Brissett confirmed this morning that the Claimant agreed

that he had been dismissed from that date. I note that it was also recorded in the case management summary that followed the Telephone Preliminary Hearing on 16 November 2017 that it was accepted that his employment ended on this day as a result of dismissal. Mr Brissett confirmed that the Claimant was not bringing a claim for constructive dismissal in relation to his resignation on 24 March. Therefore, despite the attempted resignation I find that the Claimant did receive the letter and I start from the position that there was a dismissal on 20 March 2017 (or a day or so later when the letter was received by post).

22. The Respondent concluded that the Claimant had committed gross misconduct, based upon the anonymous complaint and Mr Bacon's evidence. This is a potentially fair reason for dismissal. However, under the Burchell test I must go on to consider whether that belief was genuine and whether it was based on reasonable grounds after reasonable investigation.
23. If the Respondent was simply placing significant weight upon the anonymous evidence provided by a customer, without seeking to corroborate that evidence, it would have been a cause for concern. However, the Respondent carried out an appropriate investigation into the anonymous allegation by sending Mr Bacon to the site to see what would happen.
24. In effect, the Respondent set a trap and the Claimant fell into it. He accepted a cash sum from Mr Bacon to provide him with 5 hours parking and provided Mr Bacon with a false ticket as evidence of the transaction. Mr Bacon's evidence of what happened and the ticket itself provide compelling evidence of a dishonest diversion of funds for the Claimant's personal gain.

25. I then turn to the process followed by the Respondent prior to the Claimant's dismissal.
26. The Respondent failed to give the Claimant the opportunity to provide an explanation for his actions.
27. The Claimant made a perfectly reasonable request for the allegations to be put in writing. The Respondent reached the view that the Claimant was not going to cooperate with the process and they proceeded to summarily dismiss him.
28. I have considered the Respondent's argument that this is a case where holding a Disciplinary Hearing would have been "absolutely futile" (in accordance with the case of *Polkey v AE Dayton Services*). I do not agree with that submission. At the very least, if the Respondent had provided details of the allegations in writing, together with a copy of the ticket he had issued this would have given him the opportunity to reflect upon his position at that point. It is possible that he would have decided to resign before being dismissed. He may also have put forward some mitigation for the Respondent to consider.
29. The Respondent's has a handbook containing disciplinary procedure which sets out a clear process for a Disciplinary Hearing to take place prior to any disciplinary action being taken. It is difficult to understand why they failed to follow this process on this occasion. The Respondent is not a small company. It employs 146 people and they have a dedicated Human Resources Department. This makes their failure more significant.

30. I am not able to conclude that there would have been no point in holding a Disciplinary Hearing and I find that this amounts to a serious procedural failing.
31. I therefore conclude that although the Respondent had strong grounds for believing that the Claimant had been dishonest, they were at fault in not providing the Claimant with a reasonable opportunity to explain his actions. In accordance with Section 98 (4) of the Employment Rights Act the employer acted unreasonably and the dismissal was unfair.
32. The Respondent refers me to the **Polkey** case and also a very old case of **Linnen** in support of their contention that this is a case where the failure to hold a Disciplinary Hearing does not make the dismissal unfair. For the reasons set out above I cannot accept that. I find that the dismissal was unfair due to the significant default in the process followed. However, in accordance with the principles set out in **Polkey** I must go on to consider the percentage chance that the Claimant would have been fairly dismissed, had a fair procedure been followed.
33. On the basis of the evidence that has been produced, I have to conclude that such chance is a very high one. This is a case where the evidence of dishonesty is very strong. There was a clear basis for the Respondent to form a genuine belief that gross misconduct had occurred. The Claimant has suggested this morning that the accounts of Mr Bacon and Mr Fowler have been fabricated. He has not produced any evidence to support that contention.

34. He has also said that he could not have produced a fraudulent ticket as he was only provided with a code which enabled him to obtain a print out from the pay and display machine of all the accounts information relating to customer transactions through the machine. He has asserted today that he was not able to produce a ticket of the type provided by Mr Bacon and put in the tribunal bundle. However, whilst giving evidence he also agreed that he did have a key allowing him to open the machine and access the ticket roll.
35. If these assertions had been made at the time I find that it is highly unlikely that the Respondent would have accepted that this amounted to an adequate explanation in light of Mr Bacon's evidence of what had happened and the evidence received from a customer.
36. There was a clear basis for the Respondent to conclude that gross misconduct had taken place. This was established following a reasonable investigation. On that basis, dismissal would have been within the band of reasonable responses open to the Respondent had they conducted a Disciplinary Hearing. I therefore find that if the Respondent had followed a fair procedure there is a 90% chance that he would still have been dismissed.
37. Mr Molyneaux invites me to go on to consider the extent to which the Claimant contributed to his own dismissal. Taking into account all the evidence I find that it is more likely than not that the Claimant was operating a system of requiring cash payments from customers as an alternative to them purchasing tickets from the pay and display machine. He was thus diverting money from his employer for his own benefit. This amounts to gross misconduct.



38. In those circumstances I find that even allowing for a *Polkey* reduction the compensatory award and basic award should be reduced to nil.
39. Therefore, although the claim for unfair dismissal succeeds on procedural grounds, no award is made to the Claimant.

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Employment Judge Siddall  
London South 25 April 2019